

BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A JUDGE No. 04-239

CASE NO. SC05-851

JUDGE RICHARD H. ALBRITTON, JR.

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**PETITION FOR REVIEW OF ORDER ON MOTIONS TO COMPEL**

COMES NOW, the Honorable Richard H. Albritton, Jr., by and through his undersigned counsel and hereby respectfully requests the full Hearing Panel to review the Order on Motions to Compel dated January 26, 2006 and to direct Special Counsel of the Judicial Qualifications Commission to adhere to Florida Judicial Qualifications Commission Rule 12(b) and Florida Bar v. Graziano, 696 So. 2d 744 (Fla. 1997), by disclosing evidence presented to the Investigative Hearing Panel upon which amended formal charges were based. In addition, the Judge requests the full Hearing Panel to permit the judge an opportunity to review the evidence against him prior to submitting to a deposition.

1. Respondent filed his Demand for Rule 12(b) Materials on July 28, 2005. (See Demand for Rule 12(b) Materials, attached as Exhibit A).

2. Special Counsel filed its Response to Demand for Rule 12(b) Materials on August 19, 2005, and forwarded transcripts of testimony given by Judge Albritton dated February 11, 2005 and July 27, 2001, as well as transcripts of testimony given by Shayma Salmon, Melissa Bowers, Sandra Childers, Sandra Atkins, Peggy Roell, Tara Melton, Richard Dale Ogburn, and John A. Williams dated July 27, 2001. Only Tara Melton, Peggy Roell and John Williams are listed in the JQC's witness list of twenty-four witnesses. (See Response to Demand for Rule 12(b) Materials, attached as Exhibit B).

3. On September 20, 2005, the undersigned counsel wrote to Special Counsel and requested the witness' statements of the remaining twenty-one witnesses that are expected to offer testimony on behalf of the JQC at the Formal Hearing. (See letter dated September 20, 2005 from Scott K. Tozian, Esquire, to David T. Knight, Esquire, attached as Exhibit C).

4. On September 21, 2005, Special Counsel, David T. Knight, Esquire, responded to the request for witness statements and indicated that he was in possession of summaries of interviews taken by an investigator hired by the JQC, but claimed the documents were privileged and refused to produce them. (See letter dated September 21, 2005 from David T. Knight, Esquire, to Scott K. Tozian, Esquire, attached as Exhibit D).

5. Robert W. Butler, the investigator who conducted witness interviews and prepared the witness summaries, attests in his affidavit that the summaries currently being withheld were provided to the Investigative Hearing Panel. (See Affidavit, attached as Exhibit E).

6. Judge Albritton made several good faith, but unsuccessful, attempts to request Special Counsel to furnish the statements as required by Rule 12(b). (See letters dated September 26, 2005 and September 28, 2005, attached as Composite Exhibit F).

7. After the failed attempts to resolve this discovery dispute, Respondent filed a Motion to Compel with the Judicial Qualifications Commission Hearing Panel requesting compliance with Florida Judicial Qualifications Commission Rule 12(b). (See Respondent's Motion to Compel, dated November 2, 2005, attached as Exhibit G).

8. Judicial Qualifications Commission Special Counsel, Mr. David T. Knight, served his response on December 18, 2005, claiming that the witness statements were protected by the "work product doctrine" and should not be disclosed pursuant to Florida Rule of Civil Procedure 1.280. (See Judicial Qualifications Commission's Memorandum in Opposition to Respondent's Motion to Compel, attached as Exhibit H).

9. This response failed to address the central issue as to whether disclosure was required under Florida Bar v. Graziano 696 So. 2d 744 (Fla. 1997), because this evidence, consisting of witness statements or summaries, was provided to the Investigative Hearing Panel for its consideration in determining probable cause. Accordingly, Respondent filed a Reply to the JQC's Memorandum in Opposition. (See Respondent's Reply to the JQC's Memorandum in Opposition to Respondent's Motion to Compel, attached as Exhibit I).

10. On January 26, 2006, the Hearing Panel denied the Respondent's Motion to Compel and granted the JQC's Motion to Compel the deposition of Judge Albritton. (See Order on Motions to Compel, attached as Exhibit J).

11. Judge Albritton's entitlement to all witness statements used to find probable cause is well established. Florida Judicial Qualifications Commission Rule 12(b) requires Special Counsel to "promptly furnish" the responding judge with "copies of all written statements and transcripts of testimony" of any witness whom Special Counsel expects to call at trial. The Florida Supreme Court has held that "discovery pursuant to Rule 12(b) allows an accused judge to have full access to the evidence upon which formal charges are based." In re Graziano, 696 So. 2d 744, 751 (Fla. 1997) (*emphasis added*). In fact, the Graziano Court determined that these liberal discovery rights justified the continuing confidentiality of the original complaint. Id. at 751-52.

12. The Florida Supreme Court reiterated Special Counsel's obligation enunciated in Graziano under strikingly similar circumstances in the JQC proceeding against Cynthia A. Holloway, Inquiry Concerning a Judge, Cynthia A. Holloway, No. 00-143, Supreme Court Case No. SC00-2226. Specifically, the Florida Supreme Court determined that witness statements made to the JQC's investigator must be provided to the accused judge if the statements or statement summaries were used to find probable cause. In Holloway, Special Counsel refused to turn over summaries of witness statements made to the JQC investigator, claiming that the summaries were privileged. As a result, Judge Holloway filed a Motion to Compel with the Hearing Panel which was denied. (See Motion to Compel, dated January 31, 2001 and the Hearing Panel's Order on the Motions for Protective Order and to Compel, dated February 20, 2001, attached as Composite Exhibit K). Thereafter, Judge Holloway filed her Motion to Compel with the Florida Supreme Court on February 21, 2001. (See Motion to Compel, attached as Exhibit L). On February 22, 2001, the Supreme Court requested the JQC to file a response within one working day to the respondent's Motion to Compel. (See Order of the Supreme Court, dated February 22, 2001, attached as Exhibit M).

13. The JQC filed a nine-page response in Holloway arguing that the witness statements were prepared in anticipation of litigation, and were thus protected by the work-product doctrine. In addition, Special Counsel asserted that

the witness' statements to the JQC's investigator and the resulting witness summaries did not fall within the purview of Rule 12(b) because they were not "statements" as defined by Florida Rules of Civil Procedure. (See JQC's Motion in Opposition, dated February 23, 2001, attached as Exhibit N). The same day the JQC filed its response, the Florida Supreme Court entered its Order granting Judge Holloway's Motion to Compel and ordered the JQC to produce all statements used to determine probable cause, citing Florida Bar v. Graziano, 696 So. 2d 744 (Fla. 1997). (See Order dated February 23, 2001, attached as Exhibit O).

14. Following the Court's February 23, 2001 Order, Special Counsel promptly furnished copies of all witness summaries taken by the JQC investigator. (See letter dated March 1, 2001, attached as Exhibit P).

15. In this matter, the Hearing Panel once again determined that disclosure was not required because the summaries do not constitute a "statement" under the Rules of Civil Procedure. Regardless of how the word "statement" is defined in the Rules of Civil Procedure, the Florida Supreme Court has clearly held that an "accused judge" must have "full access to the evidence upon which formal charges are based." See Graziano at 751-752. If the witness summaries were provided to or considered by the Investigative Panel in finding probable cause, these documents must be disclosed to Judge Albritton regardless of whether they are ultimately classified as "summaries," "statements" or other evidentiary

material. Moreover, the Court required disclosure of witness summaries in Holloway.

16. If disclosure is not required, the JQC would be permitted to alter the method by which it gathers testimonial evidence (*i.e.* by failing to contemporaneously record the witnesses' statements and instead encouraging the investigator to "summarize" the witnesses' statements after the interview), and therefore circumvent the broad discovery rights guaranteed to an accused judge. While Special Counsel may certainly control the manner in which it chooses to investigate its case, the JQC should be prohibited from choosing to submit witness summaries as evidence at the 6(b) hearing to support a probable cause finding and then subsequently claiming that these summaries should not be disclosed because they are not technically witness "statements."

17. Contrary to Special Counsel's assertions, Judge Albritton is not attempting to gain access to work product materials. Any witness summary provided to the Investigative Panel as evidence in the Rule 6(b) hearing lost any "work product" status that it would have held had they not been submitted to support a probable cause determination. The Florida Supreme Court has repeatedly held as follows:

Any work product privilege that existed . . . ceases once the materials or testimony are intended for trial use. More simply, if the materials are only to aid counsel in trying the case, they are work product. But if they will

be used as evidence, the materials . . . cease to be work product and become subject to an adversary's discovery.

Northup v. Acken, 865 So. 2d 1267, 1270 (Fla. 2004)(quoting Dodson v. Persell, 390 So. 2d 704, 707 (Fla. 1980). The Court further emphasized:

[W]e reiterate our dedication today to the principle that in Florida, when a party reasonably expects or intends to utilize an item before the court at trial, for impeachment or otherwise, the video recording, document, exhibit, or other piece of evidence is fully discoverable and is not privileged work product.

Northup at 1270. In this case, the JQC's counsel made the decision to use the summaries as evidence before the Investigative Hearing Panel. As a result, the summaries could not be categorized as work product intended solely to assist counsel in their preparation for trial.

18. The JQC is attempting to force Judge Albritton to submit to a deposition without the opportunity to review the evidence against him. It is respectfully submitted that such a procedure does not lead to the ultimate goal of discovering the truth. The Amended Formal Charges in this matter contain thirty-six separate charges, most of which fail to provide any detailed information, such as the party's name or the date the alleged incident occurred, which would enable the judge to adequately and competently respond to the JQC's questions. Judge Albritton has presided over thousands of cases a year, rendering his ability to recall any one particular incident virtually impossible without the benefit of refreshing



his recollection. The JQC's determination to set the deposition without the ability to review the allegations in question suggests the JQC's attempt to "trick" the deponent rather than conducting a fair investigation into the issues.

19. The JQC has forced Judge Albritton to incur attorney's fees to enforce his entitlement to review evidence upon which the Investigative Hearing Panel found probable cause. It is respectfully requested that the full Hearing Panel require Special Counsel to reimburse Judge Albritton for the attorney's fees he has unnecessarily incurred in enforcing his request to review discovery materials. See Fla. R. Civ. P. 1.380(a)(4).

WHEREFORE and by reason of the foregoing, Respondent respectfully requests the full Hearing Panel to compel Special Counsel to comply with the holding in Graziano and disclose all evidence, including witness summaries, that were presented to the Investigative Hearing Panel. In addition, Respondent requests the Hearing Panel to permit Judge Albritton a reasonable opportunity to competently prepare for his deposition by allowing him access to the evidence already presented against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30<sup>th</sup> day of January, 2006, the original of the foregoing Petition for Review of Order on Motions to Compel has been filed via [e-file@flcourts.org](mailto:e-file@flcourts.org) and furnished by FedEx overnight delivery to:

Honorable Thomas D. Hall  
Clerk  
Supreme Court of Florida  
500 South Duval Street  
Tallahassee, Florida 32399-1927

with copies by U. S. Mail to:

Ms. Brooke S. Kennerly  
Executive Director  
Florida Judicial Qualifications Commission  
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Judge James R. Wolf  
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